Supreme Court, U.S.
FILED

96 412 JUN 26 1996

OFFICE OF THE CLERK

(1)

No. _____

In the

Supreme Court of the United States

October Term, 1995

*

DEXTER ELLERBEE

Petitioner,

v.

Cobb County School Board; Dexter Mills, in his capacity as principal in the Cobb County School System; Tony Melton, in his capacity as principal in the Cobb County Public No. School System; Jerry T. Ingram in his capacity as Deputy Superintendent for the Cobb County Public Schools; Dr. Thomas S. Tocco, in his capacity as Superintendent of the Cobb County Public School System; and Grace Calhoun, in her capacity as Assistant Superintendent of Certified Personnel of the Cobb County Public School System,

Respondents.

*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

*

PETITION FOR A WRIT OF CERTIORARI

*

GEORGE MELVILLE JOHNSON
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48 pp

QUESTIONS PRESENTED

1. Whether a pro se litigant can be denied a jury trial when he requested a jury on his civil cover sheet instead of in his complaint?

2. Whether the District Court committed reversible error by deciding that the Petitioner was not a "handicapped' individual under Section 504 of the Rehabilitation Act, 29 U.S.C., 794 as amended?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

*

Dexter Ellerbee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (No. 95-8527) is unreported. The opinion of the United States District Court for the Northern District of Georgia (1:90-CV-1759-JRS) is unreported.

JURISDICTION

The Court of Appeals entered its judgment affirming the district court ruling on or about March 28, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Federal

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 (1988).
29 U.S.C. (Sewtin 706 (7) (A)
Seventh Amendment of the United States Constitution
45 C. F.R. Section 84.3(j)(2)(i)

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITIONS OF THE COURT BELOW

The Petitioner, Dexter Ellerbee, filed his complaint against the Defendants on August 10, 1990. Along with his complaint, the Petitioner filed his civil cover sheet, having checked in the appropriate box a demand for a jury trial. (See Cover Sheet in appendix, A-3.) On or about September 14, 1990, the Plaintiff and the Respondents entered into a consent order extending the time in which the Respondents had to answer the complaint. Thereafter, on or about October 1, 1990, the Respondents filed the answer to the complaint.

On or about November 11, 1990, Judge Marvin H. Shoob recused himself from the proceedings because one of his in-laws was then a partner at the Respondents' law firm, Arnall, Golden & Gregory. Discovery continued in this matter up until June, 1993. On or about January 14, 1992, the Defendants filed a Motion for Leave to Amend their answer, specifically requesting that the defenses of qualified immunity and lack of capacity to be sued be added to the answer. Said motion was denied by the Court. On or about March 3, 1992 the Defendants filed a motion for summary judgment. Said motion was denied on or about July 6, 1992.

On or about August 9, 1994, upon learning that the case had been scheduled for a non-jury trial, Petitioner filed a motion requesting a jury trial and right to seek compensatory damages. On or about August 19, 1994, Judge Richard C. Freeman denied Petitioner's request for a jury trial. On or about August 31, 1994, the case proceeded

to a non-jury trial before Judge Freeman. At that time Judge Freeman recused himself because counsel consented to a trial by Magistrate John R. Strother, Jr. On or about November 1, 1994 the non-jury trial before Magistrate John R. Strother, Jr. began. On or about November 8, 1994 the non-jury matter was concluded. On or about March 15, 1995, Magistrate John R. Strother, Jr. entered in his final order and judgment in the matter granting judgment on all issues to the Respondents. Judgment was entered on the docket on or about March 16, 1995.

On March 28, 1996, the Court of Appeals affirmed the judgment of the district court.

*

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because Petitioner has been denied his fundamental right to a trial by jury. Trial by jury lies at the heart of the American judicial system. The denial of Petitioner's right to a jury trial by the district court and the court of appeals has caused an egregious reversible error. Petitioner's denial of a jury trial does not comport with the fundamental notions of due process embedded in our judicial system.

In addition, this Court should grant certiorari because the district court and the court of appeals for the eleventh circuit have committed error by denying Petitioner the protection that is given handicapped persons as defined by 29 U.S.C. Section 706. Moreover, the court of appeals committed additional reversible error by deciding that Petitioner was not "otherwise qualified to hold the position of a teacher pursuant to the Rehabilitation Act". Finally, both the court of appeals and the district court committed reversible error in holding that Respondent provided Petitioner with a reasonable accommodation pursuant to Section 504 of the Rehabilitation Act.

I. Right To A Jury Trial Is Guaranteed Under The Seventh Amendment

It is a well settled point of law that the denial of a jury trial must be received with the most exacting scrutiny. City of Morgantown, W. Va. v. Royal Ins. Co., 337 U.S. 254, 258-60, 69 S.Ct. 1067, 1070, 93 L.Ed. 1347 (1949); La Marca v. Turner, 995 F.2d 1526, 1544 (11th Cir. 1993), cert denied _____ U.S._____, 114 S.Ct. 1189, 127 L.Ed. 2d 539 (1994). The Supreme Court has made it clear that the right to a jury trial is fundamental and "courts must indulge every reasonable presumption against waiver" of the right to a jury trial. LaMarca v. Turner, 995 F.2d 1526, 1544 (11th Cir. 1993) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 811-12 [1937]).

Where the damages are legal in nature, a Petitioner's right to a jury trial is guaranteed under the Seventh Amendment. Curtis v. Loether, 415 U.S. 189, 198, 94 S.Ct. 1005, 1010, 397 L.Ed. 2d 260 (1974). The Seventh Amendment applies to actions enforcing statutory rights and requires a jury trial on demand whenever the statute creates legal rights and remedies that are "enforceable in an action for damages in the ordinary courts of law". Waldrop v. Southern Co. Services Inc., 24 F.3d. 152 (11th Cir. 1994).

Although much of the relief that the Petitioner sought was equitable in nature, the Petitioner was still entitled to a jury because of the compensatory damages that he sought. Compensatory damages are the classic form of legal relief. Mertens v. Hewitt Associates, 508 U.S. 248 255, 113 S. Ct. 2063, 2068, 124 L.Ed. 2d 161 (1992). In contrast, the right to a jury trial does not extend to cases in which only equitable rights

are at stake. See Curtis, supra, 415 U. S. at 148, 94 S.Ct. at 101. Since Petitioner seeks not only equitable relief, but also legal relief, he is entitled to a jury trial. It is clear from both the legal precedent of the eleventh circuit and the Supreme Court that Petitioner was entitled to a jury trial.

Petitioner was denied a jury trial because he did not request a jury trial in his complaint. The most important fact to recognize when reviewing this case is that Petitioner filed his complaint pro se. When Petitioner filed his complaint pro se he did not request a jury trial in his complaint, but he did request a jury trial on the civil cover sheet. However, someone marked out his request on the cover sheet and printed "not in comp". (Cover sheet included in Appendix at A-3.) Therefore, Petitioner was denied a jury trial because he requested a jury trial on the cover sheet and not in the complaint.

Pro se Petitioners should be accorded substantial latitude in procedural matters. McDonald v. Head Criminal Court Supervisor Officer, 850 F.2d 121, 123 (2nd Cir. 1988). Moreover, the Court is obligated to zealously guard the rights of pro se litigants. Hall v. Flynn, 829 F. Supp. 1401 (N.D. N.Y. 1993). Petitioner should not be denied a jury trial because he requested a jury trial on his civil cover sheet and not in his complaint. As a practicle matter, the difference is one that is merely procedural.

By not granting Petitioner a jury trial because he made the request on the civil cover sheet and not in the complaint, the district court deprived the Petitioner of a fundamental right. Many circuits have made it clear that procedural matters are not supposed to be a great obstacle for pro se Plaintiffs. Since trial by jury is a very important funda-

mental right, the District Court below should have zealously guarded the right of Petitioner because he was a pro se litigant. Petitioner's right to a jury trial is even more when the evidence unequivocally shows that he had the intent of having a jury trial when he filed suit. Petitioner should not have been denied a jury trial because he made his request on the wrong document.

More importantly, the writ should be granted because the circuits are split on the issue of whether checking the jury demand on the cover sheet in and of itself preserves Plaintiff's right to a jury trial. See Wright v. Lewis, 76 F.3d 57 (2nd Cir. 1996); Favors v. Coughlin, 877 F.2d 219 (2nd Cir. 1989); Pinemont Bank v. Belk, 722 F.2d 232 (5th Cir. 1984); Houston North Hospital Properties v. Telco Leasing, Inc., 688 F.2d 408 (5th Cir. 1982); Omawale v. WBZ, 610 F.2d 20 (1st Cir. 1979); Hollins v. Hoechst Celenese Corp., 134 F.R.D. 299 (S.D. Al. 1991); Winant v. Carefree Pools, 118 F.R.D. 28 (E.D.N.Y. 1988), Aff'd 891 F.2nd 278; Henderson v. Harrah's Marina Hotel Casino, 110 F.R.D. 66 (E.D. Pa. 1986); and Biesenkamp v. Atlantic Richfield Co., 70 F.R.D. 365 (D.C. Pa.1976). It is essential that this Court clarify this issue once and for all.

II. The Court of Appeals' Decision Affirming The Trial Court's Decision Relating To Petitioner's Status As A Handicapped Person As Defined by 29 U.S.C. Section 706

The Rehabilitation Act of 1973, as amended, defines the term "handicapped individual" at 29 U.S.C. Section 706(7)(B) as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment". Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986); see also E.E. Black, Ltd. v. Marshall, 497 F.Supp. 1088, 1090 (Ha. 1980). Major life activities have been defined as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 45 CFR 84.3(j)(2)(i).

Petitioner is entitled to the protection of the Rehabilitation Act because he is handicapped due to visual problems. Petitioner underwent three major eye surgeries and numerous laser treatments from 1985 to 1988. Petitioner suffered from retinal tear, cataracts, macular edema, diplopia and vitreous hemorrhages, which resulted in extreme vision loss and inconsistent levels of visual activity. The record that was before the Court of Appeals clearly showed that Petitioner's physical impairment substantially limited his vision.

A. Petitioner Was Otherwise Qualified As A Teacher

An employee who is handicapped is considered "otherwise qualified for the position if he or she can perform the essential functions of the job in question". Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993). Although Petitioner was handicapped, he could perform the essential functions of a teacher. Since Petitioner could perform the essential functions of a teacher, he was "otherwise qualified" for the position.

The Supreme Court has held that "an otherwise qualified person is one who is able to meet all of [job's] requirements in spite of his handicap". Southeastern Community College v. Davis, 442 U.S. 397, 406, 99 S.Ct. 2361, 60 L.Ed. 980 (1979). Petitioner in the case sub judice was able to meet all the requirements of his job before he began to experience visual acuity problems. In spite of the Petitioner's visual problems, Petitioner was qualified and competent to perform the essential functions of a teacher.

The Petitioner's ability to perform the essential functions of a teacher was shown by his continued certification by the State of Georgia Board of Education. Petitioner was certified for each and every year of his employment with the Cobb County Board of Education. This alone shows that the Petitioner was able to perform his essential functions of the job. In addition to being certified by the State, the Petitioner received a more than adequate evaluation from his evaluator. Consequently, the Petitioner was otherwise qualified to perform the essential functions of his job.

B. The Respondent Did Not Provide The Petitioner With A Reasonable Accommodation

According to Section 504 of the Rehabilitation Act, a handicapped person as defined by 29 U.S.C. Section 706 who is "otherwise qualified" to hold his employment position must be provided with a reasonable accommodation. The Petitioner in the case sub judice was not provided with a reasonable accommodation. Conversely, if the Petitioner had been provided with a reasonable accommodation, he would have been able to participate in activities in which he could not otherwise have participated because of his handicap. See School Board of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1223, 94 L.Ed. 307 (1987).

The paramount reason why Petitioner was dismissed was his inability to complete a Professional Intervention Plan. A teacher, who had a weakness in his or her teaching duties was required to go through a Professional Intervention Plan. The Professional Intervention Plan had to be reasonable. The completion of the intervention plan was not an essential job function; it was a nonessential job function. Therefore, Respondent was required to provide Petitioner with a reasonable accommodation.

The Respondent attempted to compel the Petitioner to complete the intervention plan which was too much a strain on his vision. The Petitioner could not complete the intervention plan because the rigorous reading and writing involved would cause undue strain on his vision. In order to remedy this problem, the Petitioner presented the Respondent with a modified intervention plan. The modified interven-

tion plan presented by the Petitioner accommodated the Petitioner's handicap and still addressed the deficiencies that were indicated by Respondents. However, Respondents refused to make any modifications.

The Respondents could only refuse to modify if they showed that modifying the intervention plan to accommodate Petitioner's visual handicap would be "highly impractical" and cause "undue hardship"; the Respondent cannot meet this showing. As a result, the Respondents acted unreasonably by not modifying the Intervention Plan. Since the Respondents have an affirmative duty to provide the Petitioner with a reasonable accommodation, their failure to do so violated Section 504 of the Act. Hence, the District Court and the Court of Appeals erred in ruling that Petitioner was provided with a reasonable accommodation.

APPENDIX

29 U.S.C. Section 794

Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States as defined in section 706(7) of this title, shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

[Regulations promulgation procedures omitted.]

(Pub. L.93-112, title V Section 504, Sept. 26, 1973, 87 Stat. 394; Pub. L. 95-602, title I, Section 119, 122(d)(2), Nov. 6, 1978, 92 Stat 2982, 2987.)

29 U.S.D. Section 706 (7) (A)

Definition (only the relevant definition is cited here)

Except as otherwise provided in subparagraph (B), the term "handicapped individual" means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.

UNITED STATES CONSTITUTION

Amendment VII - Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

CODE OF FEDERAL REGULATIONS

45 CFR Section 84.3(j)(1)

Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

CIVIL COVER SHEET

I : 90 - CV - 1759

(a) PLAINTIFFS Dexter Ellerbee

DEFENDANTS Cobb County School Board, Dexter Mills, Tony Melton, Jerry Ingram, Thomas Todd, Gale Calloway

MHS

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Cobb (EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Cobb (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEY'S (FIRM NAME, ADDRESS AND TELEPHONE NUMBER) Judges Case 1:15-MHS Category Case 442

ATTORNEYS (IF KNOWN) Dick Still

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

- ☐ 1. U.S. Government Plaintiff
- ☐ 3. Federal Question U.S. Government (not a Party)
- ☐ 2. U.S. Government Defendant
- ☐ 4. Diversity (Indicate Citizenship of Parties in Item III)

II. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX ONLY)

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☒ 1	Incorporated or Principal Place of Business in This State	☐ 1	☐ 1
Citizen of Another State	☐ 2	☐ 2	Citizen of Another State of Business in Another State	☐ 2	☐ 2
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 3	☐ 3

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY) 29 U.S. Code Section 794 which protects handicapped individuals from discrimination 29:0794

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

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- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
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- ☐ 720 Labor Mgmt Relations
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- ☐ 740 Railway Labor Act
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- ☐ 862 Black Lung (923)
- ☐ 863 DIWC (405(g))
- ☐ 863 DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

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VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

☒ 1 Original Proceedings ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 4 Appeal to District Judge from Magistrate Judgement

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A ☐ CLASS ACTION UNDER F.R.C.P. 23

DEMAND $ $250,000

Check YES only if demanded in complaint: JURY DEMAND ☒ YES ☐ NO not in comp

VII. RELATED CASE(S) IF ANY (See instructions) JUDGE _____ DOCKET NUMBER _____

DATE 8-9-90

SIGNATURE OF ATTORNEY OF RECORD Dexter Ellerbee

UNITED STATES DISTRICT COURT

BEST AVAILABLE COPY

No. 1:90-CV-1759-MH8

In the

United States District Court
For the Northern District of Georgia
Atlanta Division

_____*_____

DEXTER ELLERBEE

Petitioner,

v. 1:90-cv-1759-RCF

COBB COUNTY SCHOOL BOARD, ET AL

Respondent.

_____*_____

ORDER

This action is before the court on plaintiffs's request for a jury trial and the right to seek compensatory damages (#77-1). In the courts Order of August 12, 1994 [previous Order], the court deferred ruling upon this motion so that defendants, whose counsel was on an approved leave of absence, would have time to prepare a response.

BACKGROUND

This action arises out of plaintiff Dexter Ellerbee's termination from his position as a history and social studies teacher in the Cobb County school system. Plaintiff alleges that he suffers impaired vision caused by diabetic retinopathy. Complaint, at ¶ 7. He contends that his poor vision constitutes a physical impairment which limits his major life activities and that he is, therefore, a "handicapped individual" within the meaning of 29 U.S.C. § 794 [§ 504 of the Rehabilitation Act]. Id. at ¶ 8. Plaintiff claims that defendants conditioned plaintiff's continued employment upon his completion of a remediation plan, which plaintiff was unable to complete because defendants failed to reasonably accommodate his handicap. Id. at ¶¶ 9-11. Plaintiff argues that he was otherwise qualified to teach in the Cobb County public school system. Id. at ¶ 12.

CURRENT MOTIONS

Plaintiff seeks a jury trial of this action, as well as the court's permission to seek compensatory damages. Plaintiff claims that, because he seeks legal relief, he is entitled to a jury trial under the Seventh Amendment.[1] He further alleges that, should he establish intentional discrimination at trial, he should be permitted to seek compensatory damages as one of his remedies.

A. Jury Trial

Fed. R. Civ. P. 38(b) requires a jury demand to be made not later than "10 days after the service of the last pleading directed to such issue." Plaintiff's request in this regard comes, literally, at the last minute before trial of this action. Fed. R. Civ. P. 39(b) vests this court with the discretion to order a jury trial, notwithstanding the tardiness of the demand. The Eleventh circuit has stated that a district court should consider "(1) whether the case involves issues which are best tried before a jury; (2) whether granting the motion would result in a disruption of the court's schedule or that of the adverse party; (3) the degree of prejudice to the adverse party; (4) the length of delay in having requested a jury trial; and (5) the reason for the movant's tardiness in requesting a jury trial." Parrott v. Wilson. 707 F.2d 1262, 1267 (llth Cir. 1983).

---

[1] The Rehabilitation Act is silent as to whether a jury trial is authorized in suits under § 504.

In considering these factors, the court finds that: (1) the issues in this case are not especially suited to trial by jury rather than by the court; (2) the disruption of this court's schedule and that of defendants' would be great and inexcusable; (3) the defendants would suffer some prejudice by being forced at the last minute to alter their trial strategy (though the court does not find the prejudice unduly oppressive); (4) the delay is unjustified and excessive; and (5) plaintiff has offered no evidence or explanation beyond the mere reference to the posting of this case as a "non-jury" trial as a reason for the delay in making the request. In short, the court will not reward plaintiff Is negligence by exercising its discretion to the prejudice of defendant and the normal functioning of this court. Plaintiff's motion for a jury trial is denied.

B. Compensatory Damages

Plaintiff argues that compensatory damages are available under §504 of the Rehabilitation Act upon a showing of intentional discrimination. Defendants argue that the law is unclear in this circuit, and cite non-binding authority for their argument that, under the posture of this case, allowing compensatory damages would be "extraordinary."

The issue of the extent to which compensatory damages are available under §504 of the Rehabilitation Act has never been squarely decided by the United States Supreme Court. However, in Franklin v. Gwinnett County Public Schools, 503 U.S. _, 112 S.Ct. 1028 (1992), the Court held that compensatory damages may be appropriate upon a showing of intentional discrimination under Title IX of the Rehabili-

tation Act. Though plaintiff proceeds under §504 of the Rehabilitation Act, the Franklin court, reviewing its previous decisions, stated that a "clear majority [in Guardians Ass'n. v. Civil Service Comm'n of New York City, 463 U.S. 582, 103 S.Ct. 3221 (1983)] expressed the view that damages were available under Title VI [from which the remedies for certain §504 plaintiffs are derived] in an action seeking remedies for an intentional violation, and no Justice challenged the traditional presumption in favor of a federal court's power to award appropriate relief in a cognizable cause of action." Franklin, 112 S.Ct. at 1035.

Subsequent to Franklin, the Eleventh Circuit in Waldrop v. Southern Company Services, Inc., 24 F. 3d 152 (llth Cir. 1994) noted that "it is well-established that Congress intended the same remedies be available under Title IX and Title VI." Id., at 157 n.5. Thus, the Eleventh Circuit stated in Waldrop that "Franklin establishes that damages are available in Title VI cases as well as Title IX cases. Similarly, given that Congress specifically provided that the same remedies be available under §504 as are available under Title VI, Franklin must permit damage awards for discrimination under §504.11 Id.

Though the defendants characterize the Waldrop language as dicta, the court cannot ignore it. If it was not clear before, which the court thinks it was, the law is settled now.[2]

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[2] Lengen v. Dep't of Transportation, 903 F.2d 1464, 1468 (llth Cir. 1990), is not inapposite. In Lengen, the court held that remedies available to § 504 plaintiffs suing the federal government are identical

Compensatory damages are available upon a showing of intentional discrimination under §504 of the Rehabilitation Act. Accord Ali v. City of Clearwater, 807 F.Supp. 701, 704-05 (M.D.Fla 1992); Kraft v. Memorial Medical Center, Inc., 807 F.Supp. 785, 791-92 (S.D.Ga. 1992). Plaintiff's motion in this regard is therefore granted.

CONCLUSION

Accordingly, for the foregoing reasons, plaintiff Is motion for a jury trial and the right to seek compensatory damages (#77-1) is GRANTED in PART and DENIED in PART.

SO ORDERED, this 19th day of August, 1994.

RICHARD C. FREEMAN
SENIOR UNITED STATES DISTRICT JUDGE

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to those provided by Title VII (42 U.S.C. §2000e-16),which does not provide (prior to its amendment in 1991) for compensatory damages. See 29 U.S.C. §794a(a) (1) (setting forth remedies for certain §504 plaintiffs) . In this case, however, plaintiff's remedies are governed by 29 U.S.C. §794a(a)(2), which incorporates Title VI remedies (29 U.S.C. §2000d) for §504 plaintiffs suing entities receiving federal assistance.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DEXTER ELLERBEE, Plaintiff, V. COBB COUNTY SCHOOL BOARD; DEXTER MILLS, in his capacity as principal in the Cobb County School System; TONY MELTON, in his capacity as principal in the Cobb County Public School System; JERRY T. INGRAM, in his capacity as Deputy Superintendent of the Cobb County Public Schools; DR. THOMAS S. TOCCO, in his capacity as Superintendent of the Cobb County Public School System; and GRACE CALHOUN, in her capacity as Assistant Superintendent of Certified Personnel of the Cobb County Public School System, Defendants.	: CIVIL ACTION : NO. 1:90-CV-1759-JRS : : : : : : : : : : : : : : : : : :

ORDER and JUDGMENT

The plaintiff, Dexter Ellerbee ("Mr. Ellerbee"), brought this action against the defendants under the Federal Rehabilitation Act, 29 U.S.C. § 794, which protects handicapped individuals from discrimination by any program receiving federal financial assistance. The defendants are the Cobb County Board and several of its past and present em

ployees, who are named in their official capacities. Mr. Ellerbee was employed as a social studies teacher by the Cobb County School Board from 1979 to 1988.

To prevail in this action, Mr. Ellerbee had the burden of proving: (1) that he is a "handicapped" individual under the (R. 554-58, 352-53; Def. Exh. 48). In December of 1984, Mr. Ellerbee,[1] a long-time diabetic developed severe problems with his vision and underwent certain surgical procedures to correct the problems.(R. 367). Mr. Ellerbee's condition was diagnosed as diabetes retinopathy with vitreous hemorrhage. The court finds that, from time to time, this condition affected his vision to the extent that he was not able to teach and had to take extended periods of leave. Primarily due to the low grades that Ellerbee was giving most of his students he was found to be deficient as a teacher on his Teacher Assessment for the 1986-87 school year. Georgia law requires all teachers to have an annual performance evaluation. Any deficiencies must be addressed by development plans designed to mitigate the deficiencies. (O.C.G.A. § 20-2-210). An intervention plan was prepared for Ellerbee and he was directed to comply with it. According to the plan he was to attend a particular course on teaching and management techniques and read a book on teacher effectiveness. (Def. Ex. 96). After he received the plan, he complained to the Georgia Professional Practices Commission and appealed the imposition of the plan. (R. 333) Rather than request accommodation or some modification of the intervention plan, Ellerbee did not approve of the plan and did not want to comply. He felt that his vision problems made it a risk to

complete the plan while fulfilling his other teaching duties. (R. 333-34). The school board insisted that he must complete the plan because that was a state law.

Rehabilitation Act; (2) that he is "otherwise qualified" for the position of teacher; (3) that he was excluded from participation in, denied the benefits of, or discriminated against under the teaching program solely by reason of a visual handicap; and (4) that the program or activity in question receives federal financial assistance. Matzo v. Postmaster Gen., 685 F. Supp. 260 (D.D.C. 1987) , aff'd, 861 F.2d 1290 (D.C. Cir. 1988); Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981). The parties have stipulated that the program receives federal financial assistance. (R. 331). After a non-jury trial, and upon the evidence presented, the court concludes that the plaintiff failed to carry his burden of proof and, therefore, grants judgment in favor of the defendants based upon the following findings of fact and conclusions of law:

FINDINGS OF FACT

For his early years as a Cobb County teacher Mr. Ellerbee received satisfactory job evaluations. There were complaints about plaintiff's teaching and grading from parents, teachers and students before he started having severe eye problems. Due to the high rate of failing grades that Mr. Ellerbee gave to his students at North Cobb High School he was cautioned in February of 1983 by his principal concerning the problems he was creating. At that time, Principal James Lavendar informed Mr. Ellerbee that his future employment status would be evaluated unless he showed improvement regarding the high rate of failures in his classes; in the number of parental, student and teacher complaints regarding him; and in his deficient methods of teaching, testing and grading.

Mr. Ellerbee did not prove the elements necessary for him to prevail in this action. First, Mr. Ellerbee did not prove that he was "otherwise qualified" for the position of a teacher within the Cobb County Public Schools.

Mr. Ellerbee faced a dilemma. If, because of his vision, he was not able to complete the intervention plan imposed upon him to correct his teaching deficiencies and perform the normal duties of his job during the relevant time period, then he does not fit the definition of "otherwise qualified" because he was not able to do his job. If, on the other hand, Mr. Ellerbee was able to complete the intervention plan, but simply refused to do so, then, likewise, he was. not "otherwise qualified" for the position.

An issue before this court is whether the defendants made

reasonable accommodations for the known defects in Mr. Ellerbees vision. While the school system knew that he had vision problems and was under the care of ophthalmologist, it knew very little about the specific needs caused by Mr. Ellerbee's condition. During the entire period, Mr. Ellerbee asked Dr. Wirt Jones once to write a letter to the school system. (R. 82-3, 64-65). The school system provided the accommodations requested in that and other letters. At no time did Mr. Ellerbee have any physician provide to the school system a letter stating that he was physically unable to complete the intervention plan or any other aspect of his job. (R. 334, 372, 586, 640, 880, 1043, 80).

In fact, the doctors contradicted the allegation that Mr. Ellerbee needed help. Each time that Mr. Ellerbee returned to work, the school system received letters stating that Mr. Ellerbee was able to resume work without limitation. (Def. Exhs. 4, 7, 8, 14, 23). In March, 1988, during the time frame of the intervention plan, Mr. Ellerbee's primary physician informed the school system that Mr. Ellerbee could return to the normal activities of a school teacher. (Def. Exh. 23). During the same time period, Mr. Ellerbee himself stated that he was able to perform the normal expectations of a teacher. (R. 122; Def. Exhs. 24, 135).

The school system also made all of the accommodations actually requested by Mr. Ellerbee. In 1986, when Mr. Ellerbee complained about his assignment of classroom upon his return from a leave of absence, he was given an interior classroom without windows. (R. 123, 372). Also, to assure that the light from the windows in the doors did not bother Mr. Ellerbee's eyes, Defendant Dexter Mills

had the windows totally covered with black paper. (R. 373). The school system also approved a requested transfer and authorized a teacher's aide/paraprofessional. (R. 345, 1031; Def. Exh. 111).

In addition, the school system made arrangements in 1987 to reassign Mr. Ellerbee as a social studies teacher to Walton High School. (R. 570-72, 408-10, 1016-17; Def. Exh. 82). The reassignment would have resulted in an extra teacher allotment and in extra expenditures by the school district. (R. 409-10, 571, 584; Def. Exh. 82). This reassignment was arranged to allow Mr. Ellerbee to correct his def iciencies in a new environment. (R. 571-72; Def. Exh. 82).

Further, the school system modified the professional intervention plan, due to Mr. Ellerbee's vision problems, by allowing Mr. Ellerbee to use audio cassettes and materials to complete the plan, if they were available. (R. 454; Def. Exh. 128). In order for Mr. Ellerbee, as well as any other employee, to return to work from a leave of absence, the school system required him to obtain a release from a doctor stating that he could return to his job responsibilities without limitation. (R. 1038). The school system did not require Mr. Ellerbee to complete the intervention plan while he was on medical leave, and it extended, directly or indirectly, the time which he had to complete the plan past its original deadline. (R. 692-93, 1040-41).

The school system also gave Mr. Ellerbee compensated time off to observe other classes so that he could improve his teaching methods. (Def. Exhs. 60, 61). In May, 1986, Dr. Wirt Jones informed the school system that it should curtail or postpone Mr. Ellerbee's assignments that would require driving in unfamiliar areas. (Def. Exh. 14). In response, the school system allowed Mr.

Ellerbee to choose schools in which to observe in areas where he was familiar with the roads. (Def. Exh. 63). The school system also provided a driver to take Mr. Ellerbee to the classes that he was to observe to ensure that he would have no problems with driving. (R. 121, 251, 381; Def. Exh. 63). Mr. Mills also offered to pick up Mr. Ellerbee and transport him to a PTA open house. (R.141) .

During 1987, defendant Tony Melton, then the principal at Dodgen Middle School where Mr. Ellerbee was transferred to teach, approved Mr. Ellerbee's request to administer multiple choice tests to students and to use computer-graded answer sheets in order to cut down on reading time. (R. 959, 311). He also offered Mr. Ellerbee access to machinery that would enlarge the print on documents. (R. 960, 311). Mr. Melton further made arrangements to obtain a teacher's aide for Mr. Ellerbee; which offer Mr. Ellerbee denied in a memorandum wherein he stated that his eyes were well enough to perform the normal expectations. (Def. Exh. ill; R. 960- 63).

Finally, the school system and the Cobb County Board of Education granted Mr. Ellerbee the right to appeal his teacher assessment and the imposition of the professional intervention plan beyond the channels of the normal appeal process, finally ending with the Cobb County Board of Education. (R. 1028).

Based upon the evidence, this court finds that the school system provided every accommodation requested by Mr. Ellerbee, except elimination of the intervention plan, and that completion of the intervention plan was an essential job function. In compliance with the state law, the Georgia Department of Education requires that professional intervention plans be implemented for any teacher who ex-

hibits deficient areas in his or her annual evaluation. (O.C.G.A. § 20-2-210; R. 559, 570-80, 632, 1008-09) Failure to do so can result in the loss of state funding for the school. (O.C.G.A. § 20-2-210). Once assigned, it is a job requirement that the teacher complete the intervention plan. (R. 136, 207, 586-87, 590, 640, 742, 878, 1010). Mr. Ellerbee presented no evidence to the contrary. (R. 1121). Mr. Ellerbee did not complete the professional intervention plan which was an essential job function, (R. 389-90), despite evidence that he was able to do so. (R. 518-19, 507-08, 514-15). As such, the court finds that Mr. Ellerbee was not "otherwise qualified" for the position, as that term has been defined under the Rehabilitation Act.

Second, Mr. Ellerbee did not prove that he was discriminated against solely by reason of a handicap.

Between 1982 and 1987, over a five year period, Mr. Ellerbee gave final grades of D or F to sixty-three percent (63%) of his students on average. (Def. Exh. 42; see also, Def. Exhs. 25, 27, 29, 34, 37 and 43) . Because Mr. Ellerbee's failure rate was so high, the school system would not allow him to teach courses above the ninth grade level due to the effect the grades would have on both the students and the school. (R. 363, 698).

The school system received numerous complaints from parents, students, and teachers regarding Mr. Ellerbee. (R. 827-30, 1016, 553-56, 792, 733-36; Def. Exhs. 36, 48, 58) . In addition, Mr. Ellerbee repeatedly failed to submit lesson plans and grading plans, as required of all teachers. (R. 400; Def. Exhs. 53, 65, 75, 173). Mr. Ellerbee's deficiencies persisted for more than years and were observed, discussed and documented by three different school princi-

pals, as well as assistant principals, department heads and various central office personnel, including assistant superintendents. (R. 839-41, 735-36, 742, 702-03, 705- 09, 712-13; Def. Exhs. 31, 48, 56, 58, 62, 67, 72, 76, 91-93, 95, 172).

As a result of the complaints about Ellerbee, primarily because of the very high failure rate in his classes, poor evaluations were given to Mr. Ellerbee. In 1983, Mr. Ellerbee was given an extremely bad evaluation from Mr. Lavendar. (R. 557-58). He was also given a poor evaluation for the 1985-86 school year. (R. 824, 581-82; Def. Exh. 95). The plaintiff was also told, in that time frame, specifically those areas in which he must improve, and what to do to improve them by way of a remediation plan drafted to address his weaknesses. (R. 413-4, 850; Def. Exh. 58). In connection with his 1986-87 evaluation, which included ratings of below expectations, the school system denied a salary step increase to Mr. Ellerbee, and a professional intervention plan was developed for Mr. Ellerbee to improve his skills. (R. 403, 413, 475, 845; Def. Exhs. 91, 94, 96; Pl. Exh. 114). An intervention plan was required any time a teacher received even one grade of "below expectations." (R. 845-46, 953, 580; Def. Exh. 91). Mr. Ellerbee received eight such grades on his 1986-87 evaluation. (Def. Exh. 91). Six separate administrators and/or department heads were involved in Mr. Ellerbee's 1986-87 evaluation, in part at his request (R. 841-42). Although Mr. Ellerbee received eight marks which required the imposition of an intervention plan, the tasks he was required to complete for most of the deficient areas were duplicative (Def. Exh. 96). Given Mr. Ellerbee's identified teaching problems and deficiencies, the inter-

vention plan was reasonable and geared toward remediating those deficiencies. (R. 1022-24, 580, 583, 1041; Def. Exh. 115).

Among other things, Mr. Ellerbee refused to comply with the directive to take the Effective Teaching/Management Techniques course set forth in the intervention plan. (R. 1021-22, 1025-27; Def. Exh. 87). The Effective Teaching/Management Techniques course was essentially a "hands on," thirty hour, one week course geared to remediate deficiencies like those exhibited by Mr. Ellerbee. (R. 1022) Instead, he took a college level aerospace course that he was told would not suffice as a substitute. (R. 1026).

In August, 1988, when Mr. Ellerbee returned to work from a long-term leave of absence, the school system offered him a position at Floyd Middle School. (R. 335-36, 1037-1040; Def. Exhs.138, 141). Prior to returning from that leave, Mr. Ellerbee was reminded that completion of the intervention plan would be necessary. (R. 1039-1040; Def. Exh. 137). Dr. Tilford testified that, from a visual standpoint at that time, Mr. Ellerbee should have been able to return to school and complete the intervention plan. (R. S18-19). However, Mr. Ellerbee refused the teaching position when the school system would not eliminate the intervention plan that had previously been imposed upon him. (R. 336, 589; Def. Exh. 139). The court finds that, under the established guidelines of the school system, it properly terminated Mr. Ellerbee's position when he rejected the employment offer as a classroom teacher after coming off a long-term leave of absence. (R. 1044).

Finally, with respect to the first element of the plaintiff's claim — the issue of whether he was a handicapped individual — the evi-

dence is unclear. As such, the court finds that Mr. Ellerbee failed to meet his burden of proof. Between July, 1987, and August, 1988 (the time frame of the intervention plan), Mr. Ellerbee's worst recorded corrected visual acuity in either eye was 20/80. (Def. Exh. 184; Pl. Exh. 7). Levels of visual acuity better than 20/200 do not qualify a claimant as handicapped under the Rehabilitation Act. Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), cert. denied, 114 S.Ct. 1386 (1994). There is medical and other testimony that leads to the finding that Mr. Ellerbee was not "handicapped" within the meaning of the Rehabilitation Act. The plaintiff offered the testimony of Wirt Jones, M.D., an ophthalmologist who began treating him in 1982. (R. 39). Dr. Jones testified that, during 1987 and until March, 1988, Mr. Ellerbee's "vision was not normal, (and) that he was, to a degree, disabled." (R. 62). However, Dr. Jones defined normal vision as perfect 20/20 vision (R. 65). Moreover, Dr. Jones did not see or treat Mr. Ellerbee from March, 1988 until the time his employment ceased, a time frame important to this case. (R. 79).

The defendants offered the testimony of Ron Tilford, M.D., an ophthalmologist, who, between July, 1986 and January, 1991, served as Mr. Ellerbee's primary physician with respect to his eye problems and who treated Mr. Ellerbee in the relevant 1988 time period. (R. 486, 166). Dr. Jones referred Mr. Ellerbee to Dr. Tilford's group because of their specialty in dealing with retinal problems like Mr. Ellerbees and Dr. Jones' extremely high regard for the group. (R. 66-67). Dr. Tilford testified that Mr. Ellerbee was not substantially limited due to his vision in any of his major life activities, including caring for himself, performing manual tasks, walking, seeing,

hearing, speaking, breathing, learning and working. (R. 493-94). Dr. Tilford further testified that Mr. Ellerbee, during the relevant time period, and based upon the levels of recorded vision, should not have been hindered by his vision in completing the tasks required by the professional intervention plan that the school system required Mr. Ellerbee to complete. (R. 507-08, 514-15). In Dr. Tilford's opinion, there were no obstacles from a visual standpoint to Mr. Ellerbee returning to work as a middle school teacher and completing the required reading for the intervention plan in August, 1988. (R. 518-19). Dr. Jones had no data in his records which would allow him to form any conclusion about the plaintiff's vision in this time frame. (R. 77-79).

Moreover, the other testimony showed that, despite his vision problems, during the 185-86 and 186-87 school years, Mr. Ellerbee drove himself to work and read newspapers, texts, and other materials at school. (R. 822, 853-55). During the Summer of 1987, Mr. Ellerbee completed all the required reading for a college-level aerospace course which lasted several weeks. (R. 421-22). In 1988, when Mr. Ellerbee refused an offer from the school system for a teaching position, according to his own testimony, he had the ability to maintain written records and grade books, to read sufficiently to grade students' papers, and to read well enough to teach. (R. 344-45) Dr. Tilford opined that, at that time, Mr. Ellerbee was ready to return to work. (Def. Exh. 23). Also during that time period, Mr. Ellerbee read regularly, including magazines, books and the newspaper. (R. 341-42).

During the time period, Mr. Ellerbee held a valid driver's li-

cense, and he has never been denied a driver's license due to a visual impairment. (R. 337-38). His license lists no additional impairments other than the normal listing for eyeglasses. (R. 338). The State of Georgia has never provided special accommodations to Mr. Ellerbee to take a driver's license test. (R. 338).

Mr. Ellerbee never had or applied for a handicapped license plate or sticker for his car. (R. 394). Further, Mr. Ellerbee did not, at any relevant time, apply for any type of handicap accommodation or for any disability payments from the Social Security Administration. (R. 394-97).

In addition, from October, 1990 until March, 1992, Mr. Ellerbee held full-time employment as a consultant at an employment agency. (R. 339). Since September, 1992, Mr. Ellerbee is and has been continuously employed full-time by the State of Georgia as a Child Support Recovery Agent. (R. 340-41).

This court finds, based upon the case law and the facts presented at trial, that the evidence presented as to whether Mr. Ellerbee was handicapped within the meaning of the Rehabilitation Act was equivocal, such that the plaintiff has not carried his burden of proof.

CONCLUSIONS OF LAW

Where the plaintiff has the burden of proof on an issue and the evidence is such that a decision on the point cannot be made one way or the other, the plaintiff, the party with the burden of proof, loses and judgment must be entered for the defendants. Texas Distrib. v. Local Union No. 100, Etc., 598 F.2d 393 (5th Cir. 1979); Yorkshire Indem. Co. v. Gonzales, 210 F.2d 545 (5th cir. 1954); Texas Co. v. Hood, 161 F.2d 618 (5th Cir. 1947). Based on this standard, Mr. Ellerbee was not all handicapped" individual under the Rehabilitation Act, 29 U.S.C. § 504, § 794 as amended. As such, Mr. Ellerbee was not entitled to protection under the Rehabilitation Act. Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), cert denied, 114 S.Ct. 1386 (1994).

Mr. Ellerbee's vision problems were not a physical impairment which substantially limited one or more of his major life activities of caring for himself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), cert. denied, 114 S.Ct. 1386 (1994); 29 U.S.C. SS 706(8)(B), 794; 45 C.F.R. S 84.3(j)(2)(ii).

Mr. Ellerbee did not have a visual impairment which significantly decreased his ability to obtain satisfactory employment. Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980). An inability to perform a particular job for a particular employer is insufficient to establish a handicap. Tudyman v. United Airlines, 608 F. Supp. 739 (D.C. Cal. 1984). Instead, the impairment must substan

tially limit employment generally. Hennly v. Richardson, 264 Ga. 355, 444 S.E.2d 317 (1994). There is no evidence that Mr. Ellerbee's vision problems created difficulty in securing, retaining or advancing in employment with potential employers.

Moreover, Mr. Ellerbee was not "otherwise qualified" for the position of teacher. Southeastern Community College v. Davis, 442 U.S. 397 (1979) ; Harris v. Thigpen, 941 F. 2d 1495 (llth Cir. 1991) 45 C.F.R. S 84.3(k)(1). In spite of Mr. Ellerbee's vision problems, his record of deficiencies and his failure to improve upon them made him not "otherwise qualified." See Treadwell v. Alexander, 707 F.2d 473 (Ilth Cir. 1983). In the applicable time frame, the state school system was required to implement intervention plans for those teachers who exhibited deficiencies and to audit the implementation of such plans. O.C.G.A. § 20-2- 210. Professional intervention plans are reasonable and legitimate professional requirements for those teachers who exhibit deficiencies in their teaching methods. Pandazides v. Virginia Bd. of Educ., 804 F. Supp. 794 (E. D. Va. 1992). Completion of a professional intervention plan was an essential function of Mr. Ellerbee's teaching position. See 45 C.F.R. § 84.3(k)(1). Moreover, other essential functions of the teaching position were grading and testing students fairly and pursuant to school system policies and following administrators' directives. The school system was not required to lower its standards for grading or testing, and it was not required to sacrifice the integrity of its teaching program. McGregor v. Louisiana State Univ. Bd. of Suplrs, 3 F.3d 850 (5th Cir. 1993), cert. denied, 114 S.Ct. 1103 (1994). Mr. Ellerbee did not improve his methods of testing and grading, he did not complete the

professional intervention plan, and he did not follow his superiors' directives. The defendants were not required to eliminate essential functions of the teaching position to accommodate Mr. Ellerbee. Wood v. Omaha Sch. Dist., 985 F.2d 437 (8th Cir. 1993) ; Walders v. Garrett, 765 F.. Supp. 303 (E.D. Va.1991), aff'd, 956 F.2d 1163 (4th Cir. 1992); Gilbert v. Frank, 949 F.2d 637 (2d Cir. 1991); Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985); Florence v. Frank, 774 F. Supp. 1054 (N.D. Tex. 1991); Clarke v. Shoreline Sch. Dist., 106 Wash. 2d 102, 720 P.2d 793 (Wash. 1986). Mr. Ellerbee's refusal to complete the professional intervention plan or to improve upon his documented teaching deficiencies made him not "otherwise qualified" to teach.

The Cobb County School Board made reasonable accommodations to Mr. Ellerbee's known physical limitations, including, but not limited to, modification of equipment or devices, the provision of a teacher's aide, relocation of his particular classroom, proposal of transfers at additional costs, and other similar actions. Carter v. Bennett, 651 F. Supp. 1299 (D.D.C. 1987), aff'd, 840 F.2d 63 (D.C. Cir. 1988); 45 C.F.R. § 84.12; 45 C.F.R. § 84, App. A, No. 16. The fact that the Cobb County School Board could have provided a different set of reasonable accommodations or more accommodations does not establish that the accommodations were unreasonable or that additional accommodations were necessary. Pandazides v. Virginia Bd. of Educ., 804 F. Supp. 795 (E.D. Va. 1992).

Mr. Ellerbee was not excluded from participation in, denied the benefits of, or discriminated against by the school system solely by reason of his vision problems. Severino v. North Fort Myers Fire

Control Dist., 935 F.2d 1179 (11th Cir. 1991); Pushkin v. Regents of Univ. of Colo., 658 F. 2d 1372 (loth Cir. 1981); Santiago v. Temple Univ., 739 F. Supp. 974 (E.D. Pa. 1990), aff'd, 928 P.2d 396 (3d Cir. 1991) ; Ross v. Beaumont Hosp. , 687 F. Supp. 1115 (E. D. Mich. 1988).

Pursuant to its guidelines, the Cobb county School Board properly terminated Mr. Ellerbee's employment when he returned from a long-term leave of absence and rejected the offer of a teaching position. The Cobb County Public Schools, therefore, had a legitimate, nondiscriminatory reason for terminating Mr. Ellerbee's employment. Leckelt v. Board of Com'rs of Hosp. Dist. No. 1, 714 F. Supp. 1377 (E.D. La. 1989), aff'd, 909 F. 2d 820 (5th Cir.1990). Under these circumstances, the termination of Mr. Ellerbee was not a pretext for discrimination under the Rehabilitation Act.Id.; see also, Brousard-Norcross v. Augustana College Ass'n, 935 F.2d 974 (8th Cir. 1991).

CONCLUSION

Based on the foregoing, this court grants judgment in favor of the Defendants. The Clerk is DIRECTED to enter judgment in favor of the defendants. Each party is to bear its own costs.

IT IS SO ORDERED AND ADJUDGED this 15th day of March, 1995.

JOHN R. STROTHER, JR.
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Dexter Ellerbee,

Plaintiff,

CIVIL ACTION NO.

vs.

1:90-cv-1759-JR's

Cobb County School Board, et al,

Defendants.

JUDGMENT

This action having come before the court, Honorable John R. Strother, Jr., United States Magistrate Judge, for a bench trial, and the court having rendered its decision in favor of the defendants, it is

Ordered and Adjudged that the plaintiff take nothing and the action be, and the same hereby is **dismissed** with each party to bear its own costs.

Dated at Atlanta, Georgia, this 1 6th day of March, 1995.

Luther D. Thomas, Clerk

By:_____

Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
March 16, 1995
Luther D. Thomas, Clerk

By: _____

Deputy Clerk

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 28 1995
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 95-8527

D.C. Docket No. 1:90 - cv-1759-JEC

DEXTER ELLERBEE,

Plaintiff-Appellant,

versus

COBB COUNTY SCHOOL BOARD, DEXTER MILLS, in his capacity as principal in the Cobb County School System, TONY MELTON, in his capacity as principal in the Cobb County School System, JERRY T. INGRAM, in his capacity as Deputy Superintendent of the Cobb County Public Schools, THOMAS S. TOCCO, DR., in his capacity as Superintendent of the Cobb County Public School Systems, GRACE CALHOUN, in her capacity as Assistant Superintendent of certified personnel of the Cobb County Public School System,

Defendants -Appellees

Appeal from the United States District Court

for the Northern District of Georgia

(March 28, 1996)

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and SMITH*, Senior Circuit Judge.

*Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1[1]

"Costs taxed against plaintiff - appellant."

Judgement Entered: March 28, 1996

For the Court: Miguel L. Cortez, Clerk

By: Matt Davidson

Deputy Clerk

ISSUED AS MANDATE: 5-2-96

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[1]11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) the judgement of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) a summary judgement, directed verdict, or judgement on the pleadings is supported by the record;

(e) the judgement has been entered without a reversable error of law;

and an opinion would have no precedential value, the judgement or order may be affirmed or enforced without opinion.